IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

MONDAY, THE 26TH FEBRUARY 2007 / 7TH PHALGUNA 1928

OP.No. 8442 of 1998(E)

PETITIONER:

JOSEPH KALAPPURAKKAL,
PROPRIETOR,
PAYYAVOOR SAW MILLS,
PAYYAVOOR P.O.,
TALIPARAMBA TALUK,
KANNUR DISTRICT.

BY ADV. SRI.T.KARUNAKARAN NAMBIAR
SRI.RAJESH NAMBIAR

RESPONDENTS:

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1. THE ADDL. SALES TAX OFFICER-II,
TALIPARAMBA.

2. INTELLIGENCE OFFICER (INVESTIGATION BRANCH) OFFICER
OF THE INSPECTING ASSISTANT COMMISSIONER (INTELLIGENCE)
A.I.T. & S.T. KANNUR.

3. THE DEPUTY COMMISSIONER,
A.I.T. & S.T. KANNUR.

4. BOARD OF REVENUE (TAXES),
THIRUVANANTHAPURAM,
REPRESENTED BY ITS SECRETARY.

5. SPECIAL DEPUTY TAHSILDAR,
(REVENUE RECOVERY)
TALIPARAMBA – 670 141.

BY SPL. GOVERNMENT PLEADER(TAXES) SRI. C.K. GOVINDAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 26/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.8442/98

ORDER ON C.M.P.14406/98 IN O.P.8442/98 DISMISSED

26.2.07. SD/-S.SIRI JAGAN, JUDGE.

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF THE ORIGINAL PENALTY ORDER FRO THE YEAR 1991-92 DATED 8.3.98.

EXT.P2: TRUE COPY OF THE REVISIONAL ORDER OF 3RD RESPONDENT DATED 10.1.96.

EXT.P3: TRUE COPY OF NOTICE DATED 5.2.97 PROPOSING UNPOSITION OF PENALTY FOR THE YEAR 1991-92.

EXT.P4: TRUE COPY OF OBJECTION DATED 12.2.97.

EXT.P5: TRUE COPY OF REVISED PENALTY ORDER FO THE YEAR 1991-92 DATED 14.3.97.

EXT.P6: TRUE COPY OF THE ASSESSMENT ORDER FOR THE YER 1991-92 DATED 16.4.96.

EXT.P7: TRUE COPY OF LETTER DATED 5.2.98 SENT BY THE PETITIONER.

EXT.P8: TRUE COPY OF THE LETTER DATED 7.2.98 SENT BY PART AUTHORITY.

EXT.P9: TRUE COPY OF REVISIONAL ORDER OF 3RD RESPONDENT DATED 28.11.97.

EXT.P10: TRUE COPY OF THE REVENUE RECOVERY NOTICE DATED 14.1.98.

EXT.P11: TRUE COPY OF THE JUDGMENT OF THIS HON'BLE COURT IN O.P.3552/98.

EXT.P12: TRUE COPY OF THE AGREEMENT SUBMITTED BEFORE THE 4TH RESPONDENT.

EXT.P13: TRUE COPY OF THE REVISIONAL ORDER OF THE 4TH RESPONDENT DATED 7.4.1998.

/TRUE COPY/

PA TO JUDGE.

S.SIRI JAGAN, J.

O.P.8442 OF 1998 (E)

JUDGMENT

26.2.07.

S. SIRI JAGAN, J.

O.P.NO. 8442 OF 1998

DATED THIS THE 26th DAY OF FEBRUARY, 2007

JUDGMENT

Petitioner is an assessee under the Kerala General Sales Tax Act (K.G.S.T. Act, for short) on the files of first respondent. In this original petition, he is challenging Exts.P5, P9 and P13 orders of the authorities under the K.G.S.T. Act, which are the original penalty order under Section 45A and the revisional orders. The facts necessary for disposal of the original petition are as follows:

2. By Ext.P1 order, the first respondent imposed on the petitioner, penalty amounting to Rs.1,16,000/- on the ground that he had transported 380.41 cubic meters of timber of various species during the year 1991-92 through the port of Azheekkal without entering the same in his books of account thus evading tax payable on the sale transaction. The petitioner challenged the same before the Deputy Commissioner of Sales Tax. The Deputy Commissioner, by Ext.P2 order,found that Ext.P1 order was passed in violation of the principles of natural justice and the matter was remanded to the first respondent for fresh consideration after giving an opportunity to the petitioner to produce the books of account and to file detailed

objections. Pursuant to the same a fresh notice,Ext.P3 was issued to the petitioner. It was stated therein that the investigation branch of the Agricultural Income Tax and Sales Tax, Kannur gathered certain details relating to the transport of timber through the port of Azheekkal during the year 1991-92, which disclosed that 380.41 Cubic meters of timber were transported outside the state as stated in the notice. The petitioner filed Ext.P4 reply to the show cause notice totally denying any transport of timber through the Azheekkal port during the period in question. He specifically requested the first respondent to conduct a detailed enquiry with the Azheekkal Port and to satisfy himself regarding the specific contentions of the petitioner. The petitioner specifically alleged that there cannot be any such entries in the records of the Azheekkal Port. He also claimed an opportunity to prove that the same is a forged document by summoning the records. He specifically further alleged that no such opportunity was not given to him earlier also. However, by Ext.P5 order, the first respondent again imposed penalty of Rs.1,16,000/- on a finding that the petitioner had in fact transported 380.41 Cubic meters of timber through the Azheekkal Port. The petitioner challenged the same in revision, which was rejected by Ext.P9 order by the Deputy commissioner. The petitioner's further revision before the Board of Revenue also met with the same fate by Ext.P13 order. It is under

the above circumstances, the petitioner has filed this original petition challenging Exts.P5, P9 and P13 orders.

3. The contention of petitioner is that the burden of proof in proving that the petitioner in fact transported the timber through the Azheekkal Port is squarely on the first respondent, which burden he has failed to discharge. The petitioner contends that Ext.P3 notice issued to the petitioner does not contain the vital information regarding the dates of transport and the name of consignees, without which, the petitioner cannot file any meaningful reply to the show cause notice. He would further submit that he was also not given any copy of the extract stated to have been obtained from the records of the Azheekkal Port, which was the basis of the proceedings against him. He would point out that in Ext.P4 reply to the show cause notice he had specifically requested for an opportunity to prove that if there is actually any entries in the Azheekkal Port, those entries are false. He had specifically requested the first respondent to summon the documents from the Azheekkal Port and to verify whether the same is correct or not which the first respondent has failed to do. The petitioner submits that no attempt whatsoever has been made by the first respondent in this direction. However he would submit that his attempt to verify the records of the Azheekkal port did not also meet with any success since they refused to divulge any

information to him. However by Ext.P8 communication, the Senior Port Conservator of the Azheekkal Port informed the petitioner that no documents relating to the year 1991-92 is available at the port, since the entire records have been destroyed by a fire occurred in the port on 15th November, 1994. (This is also corroborated by a communication dated 12.2.07 from the Port Conservator of Azheekkal Port, which is produced before me by the learned Government pleader, in answer to my direction to obtain the records from the Port authorities.)

4. In the above circumstances, the petitioner would submit that the respondents have palpably failed to prove any case against the petitioner for imposition of penalty under Section 45A. In view of the destruction of the port records he is also incapacitated from proving a negative fact also. On that ground, the petitioner seeks quashing of the impugned orders.

5. In answer to the above contentions, learned Government Pleader would submit that the petitioner had been repeatedly directed to produce the books of account, delivery notes, bank pass book etc., which the petitioner steadfastly refused to do. In the above circumstances, the first respondent has no other way to decide the case on the basis of material available with him, which only he has done and therefore the impugned orders are perfectly valid and proper. According to learned Government

Pleader the very extract from the Port register collected by an Officer of the Sales Tax Department would be more than sufficient to prove the case against the petitioner for imposition of penalty under Section 45A, especially in the absence of any allegations of misconduct.

8. I have considered the rival contentions in detail. At the outset I should observe that the papers produced before me is palpably lacking in the vital details relating to the alleged transport of the timber by the petitioner through the Azheekkal Port. If an officer of the Sales Tax Department had in fact made an inspection of the Azheekkal port to gather any information regarding the transport of timber by the petitioner through that port, the first and foremost thing, an officer should have collected, is the dates of the transport as well as the names of the consignees, which information is not before me. No counter affidavit has also been filed in this case. Ext.P3 notice only reveals some names of the species of the timber allegedly transported and the quantity. The dates of transport and names of assignees are conspicuously absent. Inspite of the specific request made by the petitioner in Ext.P4 seeking summoning of the documents from the Azheekkal Port for which the second respondent had ample powers under the Kerala General Sales Tax Act, no effort is seen made by the first respondent in that direction. That itself would prove the case of

the petitioner to a great extent that he has been denied natural justice while imposing penalty on him. The Government Pleader has also no case that a copy of the extract stated to have been obtained by the Officer of the Department from the records of the Azheekkal port had been supplied to the petitioner which also would prove violation of principles of natural justice in passing Ext.P5 order. Of course, the Government Pleader, on the basis of the impugned orders would raise a contention that the petitioner had repeatedly refused to produce the documents and books of accounts called for by the Assessing Officer which itself shows a guilty mind on the part of the petitioner. But I am of opinion that perception of guilty mind by the Assessing Officer, without support of material documents to prove at least a prima facie case for imposition of penalty under Section 45A on the petitioner, is not sufficient to pass an order like Ext.P5, that too without complying with the principles of natural justice. That being so, Ext.P5 order and consequently Exts.P9 and P13 orders suffer from serious legal infirmities and are therefore liable to be quashed. I do so.

9. However, the case does not end there. In all the impugned orders, it is repeatedly stated that the petitioner has not produced delivery notes and bank pass books inspite of direction issued to him for that purpose. As I have already stated non-production of those documents have been made one of the grounds

to impose penalty on the petitioner but it appears that at the time of second revision, the petitioner had infact produced some delivery notes and pass book. In respect of the delivery notes, Board of Revenue had found thus:

> " The contentions advanced by the petitioner have been examined in detail. The investigation Branch of the department has gathered the details of timber despatched by the petitioner through Azheekkal port during the year 1991-92. As per the extracts the petitioner had transported 380.41 Cms of the Timber and Timber sizes at various dates from 4.4.1991 to 23.3.1992. The property trade mark registration in all the consignment noted as "PSMJ" (Payyavur Saw Mills Joseph Kalapurakkal) and the style is being continued till date. Shipping fee was borne by the petitioner on each occasions of transport. Therefore the contention of the petitioner that somebody had despatched the goods in his name and their property mark had been wrongly entered in the port records is not sustainable. The investigation branch has relied only on Government records is register maintained at the port. If there is any misuse of property mark as contended by the petitioner he ought to have filed complaint before the competent authority. But the petitioner has failed to do so. Inspite of that he contents that it is irrelevant.
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> The Intelligence Officer has verified the assessment records relating to the year 1991-92 and found that the originals of certain delivery notes were not produced before the assessing authority. Now at the time of hearing of the case the petitioner has produced Triplicate copies of Delivery Notes 548651, dated 25.1.1990. 548652/1.2.1990,548653/5.2.1990,548654/21.2 .1990, 548655/17.6.90 which shows transport of charcoal locally. But in the delivery note register the date of accounting the transaction was noted initially as 5.12.1991 which is seen corrected as

> 5.12.1990. Triplicate copies of delivery note Nos. 548691, 187258 and 187295 which was stated by the petitioner as used for the year 1991-92 are seen cancelled. But the petitioner has not produced the original and duplicate copies thereon for verification. Similarly delivery notes 548658, 548659, 548660, 548664,548669 are also shown as cancelled. But the original and duplicate copies of the same have not been produced for verification. In the absence of original and duplicate copies of the delivery note the contention of the petitioner that the same was used during the previous year and promptly accounted in the regular books of accounts cannot be accepted. The manipulations in the register speaks against the petitioner."

10. In respect of the pass book produced by the petitioner also there is an observation to the following effect:

> " The intelligence officer had collected details of bank deposits in the name of the petitioner in State Bank of Travancore, Sreekantapuram, Syndicate Bank, Sreekantapuram and Payyavur Service Co-operative Bank, Sreekantapuram as detailed in the penalty order. The petitioner has failed to produce the Bank pass book for verification by the Intelligence Officer. At the time of hearing the revision petition the petitioner has produced pass book issued by the Syndicate Bank, Sreekantapuram and State Bank of Travancore, Sreekantapuram along with the Ledger for the year 1991-92. The transaction in the aforesaid banks were accounted in ledger at pages 25 and 26. As per the Bank pass book and ledger the petitioner had received an amount of Rs.75,000/- by Demand draft on 3.9.1991. But the source was not explained by him. Further the petitioner has not produced the Bank pass book at the time of checking of accounts for the purpose of assessment for 1991-92. Besides as per the check note the assessing authority has signed in the ledger at folios 2,3,5,7 only. All the

> above facts clearly shows that the petitioner has failed to maintain true and complete accounts relating to his business for the year 1991-92 and the penalty imposed by the Intelligence Officer is justifiable."

In view of the said observations, I hold that it is open to the first respondent to take further proceedings against the petitioner for not maintaining true and correct accounts as required under law, in spite of my quashing of the impugned orders on the ground that no evasion of tax has been proved by showing that the petitioner had actually transported timber through the Azheekkal port. With the above observations, this original petition is disposed of.

S. SIRI JAGAN, JUDGE

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